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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693.

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF PETITIONER.

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The Daily Record Co. Print, Baltimore

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Opinions Below.

The opinion of the District Court (R. 16-19) is not reported. The opinion of the Circuit Court of Appeals (R. 32-36) is reported in 55 F. (2) 58.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 13, 1932 (R. 37). The Petition for Certiorari was filed February 12, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

Questions Presented.

1. Whether the protection afforded a "private dwelling" by Section 25, Title 2 of the National Prohibition Act, or a "house" by the Fourth Amendment to the Constitution of the United States extends to the garage on the same city lot and used as a part of the residence premises?

2. Whether the unlawful breaking, forcible entry and search of the garage used as part of the residence premises at 2:30 at night was *reasonable* within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States?

3. Whether the search and seizure was not the primary object of the arresting officers as no person was present and engaged in the commission of any offense at the time of the entry?

4. Whether the evidence so obtained and the information gained as a result of such search and seizure should have been admitted in evidence over the seasonable objection of the petitioner?

Statutes Involved.

The Fourth and Fifth Amendments to the Constitution of the United States, section 25 of title 2 of the National Prohibition Act and section 6 of the Act of November 23, 1921 (Willis-Campbell Act) are set forth in the appendix to this brief, pp. 31-33, infra.

Statement.

This case comes before the Court on writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, affirming a judgment of the United States District Court for the District of Maryland upholding the search of a garage which was part of a residence premises, at 2:30 o'clock at night, without a search warrant and sustaining the conviction of petitioner on a charge of violation of Sections 3, 25 and 29 of Title 2 of the Act of October 28, 1919, known as the National Prohibition Act.

On the night of November 19, 1930, a squad of more than six Prohibition Agents returning to Baltimore City after patrolling the roads in the vicinity for half the night, fell to discussing a premises in the Curtis Bay section of the City about which they had complaints. They were skeptical about these complaints and had not made any investigation because the place in question was just across the alley from a police station. As a result of this discussion they decided to investigate and arrived at petitioner's home at about 2:30 on the morning of November 20th. The premises consisted of a house and a one-car, metal garage built on a corner city lot. A board fence extended from the back of the house to one side of the garage. The double doors of the garage opened onto the side street. One side of the garage extended along the end of the lot next to an alley. When the agents arrived at the premises at this hour of the night they saw no one and saw no evidence of any activity whatever. They walked up to the double doors of the garage and pulled them open as far as the hasp would allow, thereby

making a small crack between the doors. One of the agents held a flashlight to an inch and a half or two inch crack underneath the doors. Through these cracks the agents claimed they saw pasteboard cartons which contained ordinary Mason jars. They could not see inside the cases and admitted they did not know what was in them. Two of the agents said they got the odor of whisky while they were looking through the cracks, but the agent, longest in the service, who was holding the flashlight to the crack under the doors, testified that he could not say he detected the odor of whisky. The agents then discovered a small door in the side of the garage which was enclosed by the fence and which opened into petitioner's back yard. One agent entered the back yard by climbing over the fence. Going to the door which led into the garage he broke off the hasp and in this way entered the garage where one hundred twenty-two cases of white corn whisky were found. After the entry had been made and while the search was in progress, the petitioner appeared on the sidewalk, was arrested by two of the agents and taken into the garage which was being searched by other agents. After his arrest, Taylor was permitted to go into the house for his coat and the agent who went with him and other agents testified that the premises was used as the private home of petitioner. The agents had no search warrant for the garage and at no time had they endeavored to obtain a search warrant from the United States Commissioner.

As a result of this search and seizure an indictment was filed against petitioner charging violation of Title 2, Sections 3, 25 and 29 of the Act of October 28, 1919, known as the National Prohibition Act. A Motion to Suppress

the Evidence and Quash the Indictment was filed and overruled by the trial Court. A plea of "not guilty" was entered, a jury trial waived and the Court, sitting as a jury, found petitioner guilty as charged in the indictment and sentenced him to be imprisoned for three months in jail and to pay a fine of Seven Hundred Fifty ($750.00) Dollars and costs.

From this judgment the petitioner appealed to the Circuit Court of Appeals, upon which appeal the Circuit Court of Appeals rendered an opinin and made an Order affirming the judgment of the District Court.

The petitioner, before his trial, sought to suppress the evidence on the ground that the search and seizure were illegally made. This was the precise point raised in the Circuit Court of Appeals. The Circuit Court of Appeals, however, affirmed the judgment of the District Court on the ground that the garage was not connected with the dwelling house.

Specifications of Errors.

1. The Circuit Court of Appeals erred in its ruling that the garage was no part of the private dwelling.

2. The Circuit Court of Appeals erred in holding that the unlawful breaking, forcible entry and search of these premises at 2:30 at night without a search warrant *was not unreasonable* within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. The Circuit Court erred in ignoring the difference laid down by this Honorable Court between the *search of*

a permanent structure for which a proper warrant may be obtained and the *search of a moving vehicle.*

4. The Court erred in attempting to justify the forcible entry on the ground that an odor of whisky was evidence of a crime committed in the presence of the officers when in fact no one was in the garage and the officers knew no person was present and committing a crime.

5. The Circuit Court erred in admitting the evidence so obtained and the information gained as a result of such search and seizure, a seasonable objection having been interposed.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN ITS RULING THAT THE GARAGE WAS NO PART OF THE PRIVATE DWELLING.

The Circuit Court of Appeals erred in holding that petitioner's garage which was a part of his private dwelling is not entitled to the protection of Section 25, Title 2 of the National Prohibition Act and the Fourth Amendment to the Constitution of the United States.

Section 25, Title 2 of the National Prohibition Act (27 U. S. C. A., Sec. 39; 41 Stat. 315) provides that no search warrant shall issue to search any private dwelling occupied as such, with certain exceptions not material here.

Section 6 of the Act of November 23, 1921 (18 U. S. C. A., Sec. 53; 42 Stat. 222, 223) provides that any officer, agent or employee of the United States who shall search

any private dwelling, as defined in the National Prohibition Act, without a search warrant, shall be guilty of a misdemeanor.

The Fourth Amendment declares that the right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

In the trial Court, the Government admitted that the premises concerned was a private dwelling occupied as such by the petitioner (R. 16).

The effect of the opinion of the Circuit Court of Appeals is to place an unjustifiably narrow interpretation upon the term "private dwelling" as used in Section 25, Title 2, National Prohibition Act, and to limit the Fourth Amendment to the Constitution by such interpretation. Such an interpretation is in direct conflict with a prior decision of the Circuit Court of Appeals in Henderson v. United States, 12 F. (2) 528, 529, one of the cases cited in the opinion of the Circuit Court. The Court has attempted to divorce from the main house those buildings convenient and necessary to the occupancy of the premises described as "within the curtilage."

This is contrary to the ruling that a garage is part of a residence premises

Temperani v. United States, 299 Fed. 365.
Bare v. Commonwealth, 122 Va. 783.
Devoe v. Commonwealth, 3 Met. 316, 325.
United States v. Slusser, 270 Fed. 818.

which is supported by Hale, Blackstone, Greenleaf, Bishop and all the text-writers.

In the famous case of Bare v. Commonwealth, 122 Va. 783, the Supreme Court of Appeals of Virginia ruled that an outhouse was included in a dwelling and in defining the term "home" as used in the prohibition law of Virginia (the Map law, Acts 1916, p. 216), that Court gave an interesting and exhaustive review of authorities on the meaning of the term. Judge Prentis speaking for the Court, said:

> "We know of no analogy in the law for the construction of this langauge, except such as is found in the common and statute law referring to arson, burglary, and to homicide and assault cases, where the prisoner claims to have committed the alleged crime in self-defense after having retreated to his castle, or his home. As construed by the courts from the earliest to the latest times, the words 'dwelling' or 'dwelling house' have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises, generally described as 'within the curtilage.'
>
> "Sir Mathew Hale says: '*Domus mansionalis* doth not only include the dwelling house but also the outhouses that are parcel thereof* * * if they are parcel of the messuage, though they are not under the same roof, or joining contiguous to it. Hale's Pleas of the Crown (558).
>
> "Blackstone (4. Bl. m. p. 225) announces the same doctrine, saying that if the houses are within the common fence, though not under the same roof or contiguous, a burglary may be committed therein

for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.'

"In 3 Greenleaf (2d ed.) sec. 80, we find this succinct and comprehensive statement: The term "mansion," or "dwelling house," comprehends all the outbuildings which are parcel thereof, thought they be not contiguous to it. All buildings within the same curtilage or common fence, and used by the same family, are considered by the law as parcel of the mansion. If they are separated from the dwelling house, and are not within the same common fence, though occupied by the same owner, the question, whether they are parcel of the mansion or not, is a question for the jury upon the evidence.'

"Mr. Bishop says: 'A dwelling house need not be under one roof. It may be a cluster of separate buildings, and it includes the outhouses and buildings in the clouster, appurtenant and auxiliary, being parcel of the messuage and within the curtilage, and which are subservient to the main dwelling for the purpose of habitation.' 2 Bish. Cr. Law (7 ed.), sec. 104; State v. Wilson, 2 N. C. 242; Pitcher v. People, 16 Mich. 147.

"Pendleton, P., in Commonwealth v. Posey, 4 Call (8 Va.) 122, 2 Am. Dec. 560, says: 'Dwelling house is a complex term, and scarcely more certain than house; for it is not confined to any particular room in the building, nor even to the same roof, but it extends to all the houses belonging to the curtilage.'

"In Page v. Commonwealth, 26 Gratt. (67 Va. 947), Moncure P., says: 'An outhouse, adjoining a dwelling house, or under the same roof, or within the cur-

tilage thereof and occupied therewith, was considered, at common law, as part and parcel of the dwelling house, within the meaning of the law concerning arson and burglary.'

"In England the curtilage seems to have included only the buildings within the inner fence or yard, because there, in early times, for defense, the custom was to enclose such place with a substantial wall. In this country, however, such walls or fences, in many cases, do not exist, so that with us the curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not.

"In Pond v. People, 8 Mich. 150, it was held in a case in which the prisoner was charged with murder, that a building thirty-six feet distant from the prisoner's house, used for preserving the nets employed in the owner's ordinary occupation as a fisherman, and also as a dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence, and that a fence is not necessary to include buildings within the curtilage if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings.

"It would seem that the special privileges pertaining to a man in his own habitation are available for his protection only while he is in such space as is usually occupied for the purposes of the dwelling and the customary out-buildings. Lee v. State, 92 Ala. 15, 9 So. 407, 25 Am. St. Rep. 17; People v. Taylor, 2 Mich. 250.

"The curtilage of a dwelling house is a space necessary and convenient, habitaually used for family

purposes and the carying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling. 3 Cyc. 988; Washington v. State, 82 Ala. 31, 280, 356; Cook v. State, 83 Ala. 62, 3 So., 849, 3 Am. St. Rep. 688; State v. Shaw, 31 Me. 523; Commonwealth v. Barney, 10 Cush. (64 Mass.) 480; Unseld v. Commonwealth, 140 Ky. 529, 131 S. W. 263, 140 Am. St. Rep. 393.

"Coming to the case and statute under consideration, it seems evident from such analogy as well as in accord with common understanding and acceptation that the words 'home' and 'permanent residence' must be construed to mean the place of residence rather than any particular building which may be at that place. It is the home which is loved, the spot to which when absent we expect to return, and which is idealized in our favorite song; that place or castle, which no man may enter without the consent of the owner, and in defense of which, and of every part of which, the taking of human life has been frequently excused."

But, so far as Constitutional rights are concerned, it is of no consequence whether the place where the liquors were seized is characterized as a "private dwelling" or a "house" within the meaning of the Fourth Amendment. The protection of the Fourth Amendment includes garages, barns and other structures.

Temperani v. United States, supra.
United States v. Slusser, supra.

The search of a dwelling for intoxicating liquor without a warrant is strictly prohibited. And the issuance of a search warrant for such a premises is definitely limited.

National Prohibition Act, Sec. 25, Title 2, 27 U. S. C. A., Sec. 39;
Espionage Act of June 15, 1917, Title XI, 18 U. S. C. A., Sec. 611 et seq.;
Singleton v. United States, 290 Fed. 130;
Staker v. United States, 5 (F. (2) 312;
Lindsly v. United States, 12 F. (2) 771;
Thompson v. United State, 22 F. (2) 134;
Carroll v. United States, 267 U. S. 132;
United States v. Berkeness, 275 U. S. 149;
Agnello v. United States, 269 U. S. 20, 30;
United States v. Dean, 50 F. (2) 905, 906;
Schroeder v. United States, 14 F. (2) 500;
Alvau v. United States, 33 F. (2) 467, 470.

In Thompson v. United States, supra, previously decided, the Circuit Court of Appeals, speaking through Judge Soper, said:

> "It is well settled that the effect of the provisions of the Fourth Amendment to the Constitution of the United States, of Section 25 of title 2 of the National Prohibition Act (27 U. S. C. A., Sec. 39), and title 11 of the Espionage Act of June 15, 1917 (40 Stat. 288; 18 U. S. C. A., Sec. 611 et seq.), is to forbid the search of a private dwelling by a national prohibition agent without a search warrant, and to require that a search warrant shall not issue to search a private dwelling unless it is being used for the unlawful sale of intoxicating liquor."

In Staker v. United States, 5 F. (2) 312, 314, the Circuit Court of Appeals, Sixth Circuit, said:

> "The officers had no probable cause to believe from the smell alone that the dwelling house was being used for sales. *The situation did not justify a search*

without a warrant (Italics ours.) The policy of the Statute goes far to restrict the right of searching a dwelling even with a warrant. Such policy cannot be frittered away by granting a broader right of search without a warrant."

This Honorable Court in Agnello v. United States, supra, citing the Temperani case, condemned the search of dwellings without a warrant. Mr. Justice BUTLER said:

"While the question has never been directly decided by this Court, it has always been assumed that one's house cannot lawfully be searched without a search warrant except as an incident to a lawful arrest therein.

Boyd v. United States, 116 U. S. 616, 624 et seq. 630.
Weeks v. United States, 232 U. S. 383.
Silverthorne Lumber Co. v. United States, 251 U. S. 385.
Gouled v. United States, 255 U. S. 298, 308.

"The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, c. 85, Tit. 11, sec. 25, 41 Stat. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for

the unlawful sale of intoxicating liquor or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel or boarding house.

"And later to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such a search.

Act of November 23, 1921, c. 134 sec. 6, 42, Stat. 222, 223.

"Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the Constitution and laws of every state of the Union. We think there is no State Statute authorizing the search of a house without a warrant; and, in a number of States laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in sec. 25 of the National Prohibition Act. Save in certain cases incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.

"Absence of any judicial approval is persuasive authority that it is unlawful. See

Entick v. Carrington, 19 Howell's State Trials, 1030, 1066.

"Beliefs however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a war-

rant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See

Temperani v. United States, 299 Fed. 365.
United States v. Rembert, 284 Fed. 996, 1000.
Connelly v. United States, 275 Fed. 509.
McClurg v. Brenton, 123 Ia. 368, 372.
People v. Margolis, 200 Mich. 431.
Childers v. Commonwealth, 198 Ky. 848.
State v. Warfield, 184 Wis. 56.

"The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment."

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE UNLAWFUL BREAKING, FORCIBLE ENTRY AND SEARCH OF THESE PREMISES AT 2:30 AT NIGHT WITHOUT A SEARCH WARRANT WAS NOT UNREASONABLE WITHIN THE CONTEMPLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The breaking into and search of any building at 2:30 o'clock at night is unreasonable and a wanton violation of the Fourth Amendment. The violation of the Constitution becomes even more grave when the building forcibly entered and searched was part of a dwelling and the occupant was aroused from his sleep.

In Alvau v. United States, 33 F. (2) 467, 470, the Circuit Court of Appeals for the Ninth Circuit, said:

"Forcibly and in the nighttime to enter an occupied residence, even though it is thought to be used in part for unlawful purposes, is likely to be attended

with disorder, and to result in violence and tragic consequences. We feel constrained to hold that the search was unreasonable and in violation of the Constitutional rights, and that therefore the evidence was inadmissible."

Speaking of this ancient grievance and recalling abuses resulting from the issuance of writs of assistance in England and the American Colonies, the Supreme Court of Michigan in People v. Marxhausen, 204 Mich. 559, 564 (1919), said:

> "The infraction of individual rights tolerated then as now under the claim of necessity in order to enforce the law finally came before the courts for decision. In the case of Entick v. Carrington, 19 Howell's State Trials, 1029, Lord Camden, pronouncing the judgment of the Court, laid broad and deep the principles which were afterwards crystallized in the Fourth Amendment."

The Court then recalled how James Otis of Massachusetts, Advocate-General of the Crown at Boston, resigned his office and acted as one of the counsel in resisting the arrests made under these warrants at a trial in Boston in 1761.

> "He spoke for five hours," the Court quotes, "and it is doubtful if any legal argument ever made on this continent produced a more profound or lasting impression. He set fire to *a torch which is still burning* (Italics ours), and which will continue to burn, for in that masterful effort he impressed upon the American heart the great lesson of resistance to tyranny and outrage. As the result of the trial the writs were never afterwards served by judicial sanction."

It is to be noted that the nighttime breaking and entry in the instant case were perpetrated without even the pretense of writ or warrant of any kind. Otis' words that these writs "placed the liberty of every man in the hands of every petty officer" apply with equal force to the acts of the prohibition agents in the case at bar.

The Supreme Court of Michigan continued:

> "These events which we have but given in outline occurred within the memory of the men who formulated and adopted the Fourth Amendment. In clear and unmistakable language these men wrote into the fundamental law of the nation to be afterwards incorporated into the fundamental law of the various States of the Union the safeguard against unlawful and unreasonable search and seizure of the person and property of the citizen, irrespective of whether such unlawful and unreasonable search and seizure had the sanction of legislative approval or rested in the arbitrary will of the executive and administrative arm of the State."

The search of petitioner's premises and the seizure of his property in the instant case offended the rights secured to him by the provisions of the fundamental law of the United States. These officers had no search warrant issued upon oath or affirmation, no warrant of any kind. They violated his privacy in the middle of the night by command of no court. They broke into and searched his premises by virtue of no process. Their acts were unreasonable and in violation of the statutes and the Constitution of the United States.

In the language of this Honorable Court in Weeks v. United States, 232 U. S. 383, 391, 392:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

III.

THE CIRCUIT COURT ERRED IN IGNORING THE DIFFERENCE LAID DOWN BY THIS HONORABLE COURT BETWEEN THE SEARCH OF A PERMANENT STRUCTURE FOR WHICH A PROPER WARRANT MAY BE OBTAINED AND THE SEARCH OF A MOVING VEHICLE.

This phase of the case was not considered in the opinion of the Circuit Court in the instant case. There was a total disregard for the "necessary difference" between the search of a *permanent structure* and a *moving vehicle*

which was clearly and distinctly laid down by this Honorable Court in Carroll v. United States, 267 U. S. 132, and repeated in the *Agnello Case*. When the Government cited the Carroll Case in support of the search without a warrant of a permanent structure in the latter case, this Honorable Court said it did not support the Government's contention and repeated the language in the *Carroll Case* which points out the difference between the search of a building and a vehicle, and emphasized it as follows:

> "We have made a somewhat extended reference to these Statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structures in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

IV.

THE COURT ERRED IN ATTEMPTING TO JUSTIFY THE FORCIBLE ENTRY ON THE GROUND THAT AN ODOR OF WHISKY WAS EVIDENCE OF A CRIME COMMITTED IN THE PRESENCE OF THE OFFICERS WHEN IN FACT NO ONE WAS IN THE GARAGE AND THE OFFICERS KNEW NO PERSON WAS PRESENT AND COMMITTING A CRIME.

The forcible entry and search in this case does not come within the exception mentioned in the *Agnello Case* of a search "incident to a lawful arrest." No person was present and subject to arrest. There was no one in

the garage and the Government agents not only did not suspect that anyone was there, but they actually *knew* by peeping through the cracks between the doors before they forced their way in that no one was there. The search and seizure cannot be justified as an incident to a lawful arrest.

Temperani v. United States, 299 Fed. 365.
Henderson v. United States, 12 F. (2) 528.
Alvau v. United States, 33 F. (2) 467.
United States v. Dean, 50 F. (2) 905.
DePater v. United States, 34 F. (2) 275.

In Alvau v. United States, supra, prohibition agents, without a search warrant, went to the defendant's residence at 3:00 o'clock during the night. Some distance from the house they detected an odor of fermenting mash which grew stronger as they approached. They investigated the barn and found in the yard a surface cesspool which was warm and from which arose the odor of fermenting mash. When they received no response to their demands for admission to the house they broke open a basement door and the search finally resulted in the discovery of a secret door in the wall of the basement which led to underground chambers where a distilling operation was discovered.

In condemning this search and seizure the Court said that the forcible entry of the house was not justified, especially since the circumstances within the knowledge of the officers were barely sufficient even in the most favorable view to authorize a magistrate to issue a search warrant.

The Court declared:

> "There was here no emergency; it is not a case of a rapidly moving automobile or other instrumentality employed in violation of the law, or of an outcry from a closed building of murder, or robbery, where immediate action is often necessary. If the information obtained by the government through the sense of smell was sufficient to authorize the issuance of a search warrant, there was no reason why the officers should not have made application therefor, and thus have proceeded in an orderly manner."

Following the rulings of this Honorable Court, evidence was suppressed by reason of an illegal search and seizure in a case parallelling the one at bar with the exception that the defendant in that case was present and refused the agents permission to enter his garage before they began their search. In allowing the Motion to Suppress the Evidence, the Court in United States v. Dean, supra, said:

> "The search was clearly illegal. Officers have no right to enter private buildings without legal justification. Where officers have knowledge that a person in the building is in the act of committing a felony, or possibly a misdemeanor, they may enter without a warrant in order to arrest him and suppress the crime, and they may enter to arrest a person against whom a warrant is out or who is reasonably suspected of having committed a felony. I am aware of no other cases in which officers are justified in forcing an entrance without a warrant into private property. These principles have been so often stated that a citation of authorities is perhaps unnecessary, but the following may be referred to: Amos v. U. S.,

255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Raniele v. U. S., 34 F. (2d) 877 (C. C. A. 8); Temperani v. U. S., 299 F. 365 (C. C. A. 9); U. S. v. Di Corvo (D. C.) 37 F. (2d) 124 (discussing cases); Russell v. State, 37 Okl. Cr. 71, 256 P. 758."

The Circuit Court of Appeals ruled in the instant case, that the search was justified by the commission of an offense in the presence of the officers (R. 34). But no offender was in the presence of the officers. This ruling is in conflict with the decision in Temperani v. United States, supra, which has been cited with approval by this Honorable Court (Agnello v. United States, 269 U. S. 20), in which it was said at page 367:

"The government, as we understand it, does not claim the right to search a private dwelling or garage under the facts disclosed by this record, but an attempt is made to justify the conduct of the officers under the common-law or statutory rule permitting peace officers to make arrests for offenses committed within their presence. But here the offender was not in the presence of the officers; he was not in the garage, and they had not reason to suspect that he was there. Laying all pretense aside, the officers entered the garage, not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury, and whatever necessity may exist for enforcing the National Prohibition Act (Comp. St. Ann. Supp. 1923, sec. 10138¼ et seq.), or other laws, the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If present laws are deficient in not permitting the search, in a constitutional way, of homes where in-

toxicating liquor is known to be manufactured, the remedy is with Congress, not in subterfuge or evasion. For these reasons, the court should have kept from the jury all property found on the search and all evidence given by the officers concerning the same. Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654."

Circuit Judge Mack, speaking for the Circuit Court of Appeals for the Sixth Circuit, expounds and condemns this justification theory in Staker v. United States, supra, and, at page 314, says:

"The government attempts to justify the search on the ground that peace officers have the right to arrest and search a person committing a criminal offense in their presence. Leaving aside the question whether prohibition agents are peace officers (see Brady v. U. S., 300 F. 540 (C. C. A. 6); Agnello v. U. S., 290 F. 671 (C. C. A. 2), the offender was not in the presence of the officers, and there is no evidence that they had reason to suspect that he was. (Temperani v. U. S., 299 Fd. 65 (C. C. A. 9). Moreover, it may be questioned whether, in cases of misdemeanor, a peace officer or a private person has any power of arresting without a warrant except when a breach of peace has been committed in his presence, or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence. Wilgus, Arrest Without Warrant, 22 Mich. Law Rev. 541, 673, 798, especially 703-709. There is no evidence here of any breach of peace, existing or imminent, which would justify the exercise of powers sanctioned by the common law only in situations of emergency. See Carroll v. U. S., supra. In Agnello v. U. S., supra, McBride v. U. S. C. C.

A.) 284 F. 416 (C. C. A. 5), and Garske v U. S. (C. C. A.) 1 Fed. 620, the search was justified as incidental to a lawful arrest."

In some instances the common law may be relied upon to supply incidents of the powers of police officers, but in modern times their duties and powers are almost entirely defined and regulated by statute. The common law powers of peace officers have been limited by Constitutional provisions and largely replaced by statutes and regulations. But prohibition agents were officers unknown to the common law. They are civil officers of the United States (Dumbra v. United States, 268 U. S. 435) who are creatures of statutory law and no statute confers upon prohibition agents the *general* powers of peace officers. Furthermore, the common law could not be invoked since the National Prohibition Act itself is clear and definite as to the procedure to be followed by prohibition agents in its enforcement. Their conduct in the instant case cannot be justified by the common law when it was prohibited in particular by the National Prohibition Act, and in general by the Fourth Amendment to the Constitution.

Nowhere in the statutes can justification for the procedure of the prohibition agents in the instant case be found. And justification is incumbent upon the Government. Concerning such justification, Mr. Justice Bradley in Boyd v. United States, supra, cited Entick v. Carrington, supra, and characterized it as follows:

"The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick v.*

Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. After describing the power claimed by the Secretary of State for issuing general search warrants and the manner in which they were executed, Lord Camden says: 'Such is the power, and therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

" 'The great end for which men entered into society was to secure their property. That right is reserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damages be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defen-

dant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.'"

Further commenting on Lord Camden's decision in the same case, Mr. Justice BRADLEY said:

"The law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time."

That the end justifies the means is "a doctrine which has not found lodgment in the archives of this Court," is as true of this Honorable Court as it is of the Supreme Court of Michigan which applied the phrase to itself in People v. Marxhausen, 204 Michigan 559, 564 (1919), wherein the search of a residence premises was condemned on the authority of Boyd v. United States, supra, and Weeks v. United States, supra, and the following language used:

"The search and seizure detailed in this record was an unauthorized trespass and an invasion of the Constitutional rights of this defendant.

"These rights of the individual in his person and property should be held sacred, and any attempt to fritter them away under the guise of enforcing dras-

tic sumptuary legislation (no matter how beneficial to the people it may be claimed to be), must meet with the clear and earnest disapproval of the courts."

The Court in the above case gave effect to the conclusion of Mr. Justice DAY in the *Weeks Case* that if the judgments of the Courts, which are charged at all times with the support of the Constitution, are to sanction the tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures destructive of the rights secured by the Federal Constitution, the protection of the Fourth Amendment is of no value and might as well be stricken from the Constitution.

V.

THE CIRCUIT COURT ERRED IN ADMITTING THE EVIDENCE SO OBTAINED AND THE INFORMATION GAINED AS A RESULT OF SUCH SEARCH AND SEIZURE, A SEASONABLE OBJECTION HAVING BEEN INTERPOSED.

A seasonable objection was made to the use of evidence resulting from this search on the ground that it was obtained by an illegal search and seizure and for that reason violated section 25, title 2, National Prohibition Act and the Fourth and Fifth Amendments to the Constitution of the United States. In accordance with prior rulings of the Circuit Court of Appeals for the Fourth Circuit and of this Honorable Court the evidence offered in this case was not admissible against the petitioner.

Mahoney v. United States, (C. C. A. 4th) 26 F. (2) 902.

Snyder v. United States, (C. C. A. 4th) 285 Fed. 1.

Byars v. United States, 273 U. S. 28.

In Snyder v. United States, supra, Judge Groner, speaking for the Circuit Court of Appeals for the Fourth Circuit, said:

> "In the Federal Courts evidence obtained from defendant by an unlawful search is inadmissible against him.
>
> Boyd v. United States, 116 U. S. 616;
> Weeks v. United States, 232 U. S. 383;
> Silverthorne Lbr. Co. v. United States, 251 U. S. 385;
> Gouled v. United States, 255 U. S. 398;
> Amos v. United States, 255 U. S. 313."

In Byars v. United States, 273 U. S. 28, the defendant was convicted of the possession of strip stamps which were admitted in evidence over his objection that they had been obtained by an unlawful search and seizure. A timely motion made by the defendant was overruled by the trial Court. In reversing the Circuit Court of Appeals which affirmed the judgment of the trial Court, Mr. Justice SUTHERLAND said:

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what is brought to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our Constitutional system that evidence of crime discovered by a Federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

CONCLUSION.

It is respectfully submitted that the search of petitioner's garage, which was a part of his residence, at 2:30 o'clock during the night and in which no person was present committing a crime was unreasonable, unlawful, illegal, unauthorized and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, contrary to Section 25, Title 2 of the National Prohibition Act, and to Section 6 of an Act Supplemental to the National Prohibition Act, approved November 23, 1921, and that the Circuit Court of Appeals for the Fourth Circuit erred in upholding such a search when a timely challenge to the evidence and information gained as a result of the search was interposed, and that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

The Fourth Amendment to the Constitution of the United States, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 25, Title II, of the National Prohibition Act, c. 85; 27 U. S. C. A., Sec. 39; 41 Stat. 315, provides:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor

intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

Section 6 of the Act of November 23, 1921, c. 134; 18 U. S. C. A., Sec. 53; 42 Stat. 222, 223, provides:

That any officer, agent or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing

such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.